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No. 10-1065

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In The
# Supreme Court of the United States

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,

*Petitioners,*

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EDWIN JOHNSTON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## INTRODUCTION

The case described in the Petition bears little resemblance to the case litigated and decided below. Petitioners O.K. Industries, Inc., O.K. Farms, Inc., O.K. Foods, Inc., and O.K. Broiler Farms Limited Partnership (collectively "OK") suggest that the U.S. Court of Appeals for the Tenth Circuit has issued a ground-breaking decision that would free litigants from the necessity of conducting market analysis in rule of reason cases, specifically creating a conflict with cases decided under the Sherman Act that require a showing of market power in the output market. In reality, the Tenth Circuit issued a brief opinion affirming that the evidence presented at trial by Respondents – a class of approximately 300 Oklahoma chicken farmers ("Growers") – was sufficient to support the jury's verdict that OK violated § 202(a) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 192(b). The Tenth Circuit affirmed that there was sufficient evidence that OK had monopsony power in the input market for the purchase of Grower services, and used its monopsony power in *that* market to engage in unfair practices which depressed input market prices and production, with the further likely effect of increasing output market prices.

As a result, OK's urged grounds for review are flawed. First, courts have consistently recognized that the PSA, while drawing on antitrust principles, is a remedial statute designed to protect farmers, like Growers here, from the powerful economic leverage of processors, like OK. Because the PSA has a broader

scope and purpose than the Sherman Act, a decision concerning the standards applicable to a § 202(a) claim cannot, as a matter of law or logic, create a "circuit split" as to the standards applicable to Sherman Act claims. Second, even if the legal standards governing claims under § 202(a) and general antitrust laws were identical, OK has chosen the wrong antitrust authorities. The claim upon which Growers prevailed is for abuse of monopsony power in an input (buying) market; whereas, the "conflicting" cases cited by OK involve challenges to vertical restraints in output (selling) markets. The fact that selling-side cases require a showing of market power in an output market is as unsurprising as the cases are inapplicable to a buying-side claim. Finally, OK fails to mention that its essential contention herein – that Growers should have been required to prove that OK had market power in the output market – was the subject of a contrary jury instruction, to which OK did not object. OK should not be permitted to seek review of the Tenth Circuit's judgment on the basis of a jury instruction that it accepted below.

Secondarily, OK presses a novel theory of statutory construction: that because § 202(a) of the PSA only prohibits unfair practices "with respect to *live* poultry," the statute cannot apply to OK's production decisions because those decisions were made *prior* to chickens having hatched. This interpretation of § 202(a) is at odds with the plain language and purpose of the statute, was soundly rejected by the

District Court and Tenth Circuit, and has not been adopted by any court in the PSA's 90-year history. Further, OK attempts to disguise within this statutory construction argument another sufficiency of the evidence argument: that OK should not have been found to have reduced production because it always produced at full capacity. To be clear, OK waived this issue by failing to raise it in a Fed. R. Civ. P. 50(a) motion, and in any event both the District Court and Tenth Circuit found that there was specific and substantial evidence that OK in fact reduced production. Therefore, OK's secondary arguments present no better grounds for certiorari review than its primary argument regarding output market power. The Petition should be denied.

## STATEMENT OF THE CASE

1. Growers are a certified class of approximately 300 Oklahoma farmers who, during the relevant time period, raised broiler chickens for OK. Growers alleged that OK engaged in unfair practices in violation of § 202(a) of the PSA, 7 U.S.C. § 192(a). Specifically, Growers alleged that OK used its monopsony power in the relevant regional market – the market for the purchase of grower services in eastern Oklahoma – to engage in five practices that depressed Grower pay and had the likely effect of increasing OK's resale prices.

2. In *Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007) [hereinafter "*Been I*"], the Tenth Circuit, joining all other circuit courts to have considered the issue, held that § 202(a) of the PSA requires proof of injury or likely injury to competition. Considering the requirements for establishing such injury in the context of an allegation of "unfair practices" under § 202(a), the Tenth Circuit held: (a) the PSA's scope is broader than that of antitrust laws; (b) if there is but one purchaser of particular inputs in a particular region, such that the seller can find no alternative buyer, the purchaser is a monopsonist within that regional input market; and (c) to establish injury to competition, a plaintiff alleging abuse of monopsony power must show that the monopsonist engaged in practices that depressed prices on the input market with the effect or likely effect of increasing prices in the output market. *Id.*, App.55a-61a.

3. Reversing the district court's initial grant of summary judgment for OK, the Tenth Circuit found that Growers had presented evidentiary material that supported their contention that OK was a monopsonist in the area in which Growers operated, *id.* at App.55a, and that OK had engaged in practices – for example using its total control of input supply to manipulate Growers' production – that presented "the classic monopsony injury, namely that OK [wa]s depressing the prices it pa[id] the Growers and reselling at inflated prices." *Id.*, App.59a-60a. Thus, the Tenth Circuit held that a genuine issue of material

fact existed as to whether OK had violated § 202(a). *Id.*, App.59a.

4. Upon remand, the case proceeded to a jury trial, where the evidence showed:

a. OK is a vertically-integrated producer of poultry. During the class period OK was engaged in almost every stage of poultry production, including breeding, hatching, milling feed, medicating, transporting, slaughtering, processing, and selling on the wholesale market.

b. OK contracted with "growers" to raise broiler chicks to slaughtering age. The chickens placed with Growers at all times remained the property of OK.

c. Before OK provided contracts to Growers, it required them to obtain financing and build chicken houses to OK's exacting specifications, at a cost of hundreds of thousands of dollars.

d. Grower contracts are drafted by OK and are offered on a "take-it-or-leave-it" basis. Because OK does not present contracts to Growers until after the houses are built, Growers have no alternative but to accept.

e. OK's contracts only obligate it to provide Growers a single flock of chicks. Yet, as an OK officer admitted at trial, because of the large capital commitment required to build houses, a Grower may need to

raise chickens for up to 25 years to recover his or her initial investment.

f. OK's contracts prohibit Growers from using chicks, feed, or medicine from any source other than OK. The contracts prohibit Growers from raising chickens for other buyers, even if OK decreases the amount of birds delivered to Growers.

g. No other integrator operates in the geographic area of eastern Oklahoma in which Growers' farms are located. Because OK is the only buyer of Grower services in the area, Growers have no option but to sell to OK. Both Growers' and OK's experts agreed that OK is a monopsonist in the area in which Growers' farms are located.

h. OK is not only a monopsonist in the input market for Grower services, it has complete control over input supply. OK approves who will be a Grower and where, and determines if and when to deliver flocks to Growers. OK alone decides the number of flocks of chickens placed with Growers, the number of chicks per flock, the breed and health of the chicks in a flock, the quantity and quality of feed given to the flock, the use and type of medications given to the flock, and the date on which the flock is collected for processing.

5. Through discovery, Growers obtained actual statistical data collected by OK on *every* flock raised

by *every* OK grower during the class period. This data was exhaustively analyzed by Growers' expert witness and agricultural economist, Dr. C. Robert Taylor of Auburn University. At trial, Taylor testified about his examination of this data and analyses of OK's practices, including their effects on OK's input and output markets. Specifically:

a. Taylor testified that the data and analyses showed OK used its monopsony power and complete control of input supply to engage in five unfair practices that harmed Growers and injured competition. Most notably, OK in certain economic circumstances manipulated Grower production downward by (i) altering the number of days between flocks placed with Growers, and (ii) altering the number of chickens per square foot of housing space, or "density," of flocks placed with Growers. Taylor testified that each of the challenged practices had the effect of depressing Grower pay below what it would have been in a competitive market, and directly and/or indirectly reducing production of chicken products below what it would have been in a competitive market.

b. Applying economic principles of monopsony to the facts at issue in this case, Taylor testified that the decreases in input-market price and production caused by each of the challenged practices would reduce supply to the output

market and likely lead to increases in output market prices.

c. Taylor testified that each of the challenged practices had in fact resulted in specific, actualized impact on OK's immediate resale and national wholesale prices. Specifically, Taylor performed four regression analyses examining the relationship between OK's production and output prices, which showed: (i) when OK decreased production, its average sales price increased; (ii) when OK decreased production, its average sales price increased relative to the average national sales price; (iii) when OK decreased production, the average national sales price increased; and (iv) when OK received a lower-than-typical price, its production two months later (*i.e.*, after the time it takes to raise chickens) decreased. OK's expert agreed that these analyses were correctly calculated and that up to 75% of OK's price variations could be attributed to monopsonistic practices.

d. Taylor concluded that OK underpaid Growers as a result of their anticompetitive actions during the class period, and calculated the difference between the profits Growers actually received and the profits they would have earned in a competitive market (*i.e.*, a market free of the anticompetitive conduct in question), as $14,511,935.

6. On March 10, 2008, the jury returned a verdict in favor of Growers, finding that OK had violated § 202(a) of the PSA and awarding Growers damages of $21,141,975.[1] On July 3, 2008, the district court denied OK's motion for judgment as a matter of law ("JMOL") and conditionally denied OK's motion for new trial, *sua sponte* suggesting remittitur to $14,511,935. In an effort to end litigation that had already lasted six years, Growers consented to the suggested remittitur.

7. In *Been v. O.K. Industries, Inc.*, 2010 WL 3995981 (10th Cir. Oct. 13, 2010) [hereinafter "*Been II*"], the Tenth Circuit was called upon to review the case for a second time. The Tenth Circuit affirmed the

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[1] In its Petition, OK attempts to relitigate factual disputes decided against it at trial, and in several instances does so based on assertions that are inconsistent with the record evidence. In particular, cognizant of Supreme Court Rule 15.2, Growers point out that: (a) OK asserts that Growers "conceded" that production was unaffected by OK's practices, when in fact – as noted by the Tenth Circuit, *Been II*, App.18a – Growers argued and proved that OK's practices depressed production; (b) OK asserts that Growers "conceded" that OK produced to its full capacity, even though – again as noted by the Tenth Circuit, *id.* – Growers argued and proved that OK at times deliberately decreased production; (c) OK asserts that Growers "conceded" that OK never terminated a Grower, despite that Growers presented evidence of just that; (d) OK asserts that it invested "more than $370,000 each year to supply inputs to [a] two-house farm," *see* Petition at 9, when there was no such evidence below; and (e) OK asserts that Taylor "conceded" that OK's density decisions did not affect production, when in fact Taylor testified that decreasing density was one means by which OK reduced production below what it would have been in a competitive market.

judgment below, holding *inter alia* that OK had waived many of the arguments raised on appeal; that the jury had been instructed in accordance with the correct standards for proof of violation of § 202(a); and that sufficient evidence supported the jury's verdict. *Been II*, App.16a-33a. Specifically, in response to OK's argument that its practices could not have affected output prices because it lacked output market power, the Tenth Circuit found that there was specific and sufficient evidence that OK's practices impacted both its immediate resale and the national wholesale prices for chicken products, and thus, at minimum, established that such practices, over time, were likely to increase consumer prices for OK's products in comparison to what prices would have been but for the practices. *Id.*, App.19a-20a. The Tenth Circuit likewise rejected OK's restrictive construction of the phrase "with respect to live poultry" in § 202(a) and, in response to OK's argument that it had always operated at full capacity, found that there was specific and sufficient evidence that OK could and did vary its production levels. *Id.*, App.16a-18a.

## REASONS TO DENY THE PETITION

### I. REVIEW IS UNNECESSARY WHERE OK WAIVED THE ISSUE IT SEEKS TO PRESENT AND WHERE THE TENTH CIRCUIT'S OPINION ADDRESSES A QUESTION OF PROOF RATHER THAN A QUESTION OF LAW, AND HAS NO IMPACT ON THE ANTITRUST LAWS.

As shown in the Statement of the Case, *infra*, Growers established at trial that OK held monopsony power in the market for the purchase of grower services in eastern Oklahoma, and that OK used its monopsony power to engage in practices which decreased grower production and pay, with the effect, or likely effect, of increasing prices in the output market. The Tenth Circuit held that, under *Been I*, this evidence was sufficient to sustain the jury's verdict against OK on Growers' claim for violation of § 202(a) of the PSA.

OK contends, however, that the Tenth Circuit erred by not requiring Growers also to make a threshold showing that OK possessed market power in the *output* market for the sale of chicken meat. From this foundation, OK erroneously asserts that, because the Tenth Circuit found Growers' expert testimony and analysis demonstrating likely increases in output prices was sufficient to affirm the jury's verdict, the Tenth Circuit's opinion establishes a rule that evidence of actual detrimental effects is sufficient to demonstrate injury to competition for every case brought under the antitrust laws. Such a

holding, argues OK, creates a split among the circuits because "[i]n cases challenging vertical conduct, the circuit courts have consistently held that proof of injury to competition requires a threshold showing that the defendant wields power in the relevant output market." Petition at 5.

As the following demonstrates, OK failed to object when the District Court instructed the jury that proof of output market power was not part of Growers' burden of proof under § 202(a). OK thus waived appellate review of this claim. In any event, the District Court allowed OK to argue to the jury, as a defense, that its alleged lack of market power precluded a finding of likely impact on output prices. The jury simply rejected OK's evidence on this point. Further, because *Been II* addresses only whether Growers met their burden of proof under § 202(a), it creates no conflict with other circuits as to a plaintiff's burden of proof under the antitrust laws.

### A. Review is not warranted where OK failed to preserve its claim that Growers were required to prove that OK possessed market power in the output market under § 202(a) of the PSA, and where OK was nevertheless permitted to present evidence of its alleged output market share to the jury as a defense.

Following remand from the Tenth Circuit in *Been I*, OK moved for summary judgment on the ground,

*inter alia*, that OK was incapable as a matter of law of affecting prices in the output market due to its allegedly minimal market share in the output market. After noting that the parties disagreed about whether proof of an integrator's market power in the output market was a distinct element of a plaintiff's claim under § 202(a), *see* Order Denying Mot. For Summary J., App.95a-97a, the District Court deferred ruling on this issue. *Id.*, App.98a. Subsequently, however, the District Court rejected OK's argument, instructing the jury:

> You are specifically instructed that whether or not defendants have market power in the output market is not part of plaintiffs' burden of proof.

Order Denying Mot. For JMOL, App.83a. *OK did not object to this instruction. Id.* Accordingly, when OK sought JMOL on the ground that Growers had failed to show that OK exercised market power in any output market, the District Court indicated that its review of this instruction was limited by Fed. R. Civ. P. 51 to "plain error," which the Court concluded was not present. *Id.*

In its Petition, OK mentions neither the District Court's jury instruction regarding market power in the output market, nor its acceptance of that instruction. Further, OK makes no claim that the District Court committed plain error in its jury instructions. In any event, even if the District Court's instruction had been erroneous, OK was not harmed by the error

because the District Court permitted OK to admit evidence purporting to show its lack of output market power and to argue that this evidence meant that it had no ability to raise output prices. As the District Court stated:

> Clearly the Tenth Circuit did not place the burden on plaintiffs to demonstrate defendants' market share in the output market. This court permitted defendants to present such evidence as a defense, but *the jury manifestly rejected that defense.*

Order Denying Mot. For JMOL, App.83a (emphasis added). Because OK was permitted to present its market-share arguments to the jury, along with whatever evidence it felt supported that argument, OK's complaint is simply that the jury should have believed its evidence, but did not. This is not an appropriate basis for certiorari review.

### B. The Tenth Circuit's conclusion that Growers met their burden of proof under § 202(a) of the PSA does not, and could not, conflict with antitrust authorities.

In *Been II*, the Tenth Circuit was called upon to address the sufficiency of Growers' evidence to support their claim against OK for "unfair practices" under § 202(a). The Court was not called upon to evaluate a challenge to a vertical restraint under the antitrust laws, as OK would suggest. Because the evidence showed that OK was a monopsonist in the

relevant market, the Tenth Circuit's inquiry was simply whether Growers' evidence was sufficient to show that OK's practices were likely to cause "the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market." *Been II*, App.4a (quoting *Been I*, App.57a). The Tenth Circuit found that Growers had presented sufficient evidence to meet their burden of proof under § 202(a) and to sustain the jury's verdict. In particular, the Court stated:

> The Growers' expert, Taylor, opined that OK's production practices impacted immediate resale and national prices. That testimony, notwithstanding OK's own evidence of its purported lack of market power, was sufficient in our view both to create a genuine issue of material fact as to whether OK's production practices 'over time [were] likely to increase consumer prices for [OK's] products in comparison to what prices would have been but for the practice,' . . . and to support the jury's verdict in favor of the Growers.

*Been II*, App.19a.

As this reflects, the Tenth Circuit's holding was simply that the evidence produced by Growers was sufficient to satisfy the particular standard of proof for (a) a claim alleging abuse of *monopsony* power, that (b) was brought under § 202(a) of the *PSA*. OK's contrary description of the underlying holding – that

*Been II* deems evidence of actual detrimental effects "sufficient for every case brought under the antitrust laws" – is an extreme overstatement.

In attempting to manufacture the appearance of a conflict between *Been II* and antitrust authorities, OK ignores the fact that the PSA and the Sherman Act are distinct statutes. The PSA is a remedial statute designed to protect farmers and, by extension, the public against the economic power of the intermediary firms that stand between the two. As this Court has explained, "[t]he chief evil feared [by the PSA] is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). *See also Been I*, App.48a ("the primary purpose of [the PSA] is to . . . safeguard farmers . . . against receiving less than the true market value of their livestock." (internal quotation marks omitted)); *Swift & Co. v. U.S.*, 393 F.2d, 247, 253 (7th Cir. 1968) ("The [PSA] is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen."). To this purpose, while the PSA incorporates "the basic antitrust blueprint of the Sherman Act," it is intended to be "broader than antecedent antitrust legislation." *Been I*, App.48a, 55a; *see also Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) ("The legislative history shows Congress understood the sections of the Packers and Stockyards Act under consideration were broader in

scope than [the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Interstate Commerce Act]"). The PSA thus "proscribes practices which the Sherman Act would permit." *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980) (citing *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968)). For example, unlike general antitrust law, § 202(a) does not require that a defendant willfully acquire monopoly (or monopsony) power, or that a defendant have the power to exclude competitors or the intent to harm competition. *Been I*, App.55a. Accordingly, OK's premise that the Tenth Circuit's decision about the standards of proof for a claim under § 202(a) of the PSA would be read as applying to a claim under the Sherman Act is unpersuasive.

Moreover, even if the Tenth Circuit's analysis in *Been II* were somehow taken to apply to claims under the Sherman Act, it would not conflict with the authorities cited by OK. Each of the cases OK cites as holding that an antitrust plaintiff must demonstrate market power in an *output* market involves a challenge to selling practices. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717 (7th Cir. 2004) (challenging manufacturer's sale of cigarette papers through exclusive distributorship agreements); *PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412 (5th Cir. 2010) (challenging manufacturer's use of vertical resale price maintenance agreements); *Digital Equipment Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756 (7th Cir. 1996)

(challenging manufacturer's termination of distributorship agreement); *Deutscher Tennis Bund GmBH v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir.), *cert. denied*, 131 S. Ct. 658 (2010) (challenging tennis association's decision to downgrade status of tournament). Where the challenged conduct occurs in an output market, it is hardly surprising that the plaintiff would be required to show that the defendant possesses market power in that output market.

That is not the situation at issue here. This case involves OK's buying practices, and alleged abuse of its monopsony power in the input market. Where the challenged conduct occurs in an *input* market, a plaintiff must show market power in that market, not the output market. *See Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 323-24 (2007) (explaining that monopoly and monopsony are analytically identical but flipped; rather than examining seller behavior and output prices, monopsony cases focus on buyer behavior and input prices); *Been I*, App.55a ("when analyzing whether a buyer's 'monopsony' power injures competition . . . the inquiry is somewhat different from the inquiry into whether a seller's monopoly power injures competition"). Here, it was undisputed that OK had 100% market power in the relevant market: the input market for the purchase of grower services in eastern Oklahoma. In not requiring Growers to establish that OK possessed market power in an output market as an element of their monopsony claim, the Tenth Circuit has not deviated one bit from antitrust precedents. Neither

the Tenth Circuit nor this Court has required plaintiffs challenging the abuse of monopsony power to prove that the defendant has market power in the output market. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (holding that sugar-beet growers stated a valid monopsony claim under the Sherman Act despite not even alleging an effect on consumer prices); *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002) (rejecting claim that a monopsony plaintiff must show impact in output market).

There is thus no conflict or "circuit split" created by *Been II* and *Republic Tobacco*, because they address divergent factual and legal contexts. In the absence of any identifiable conflict among the circuits relating to the actual holding of *Been II*, review of the Tenth Circuit's opinion is not warranted.

## II. REVIEW OF OK'S STRAINED CONSTRUCTION OF THE PHRASE "WITH RESPECT TO LIVE POULTRY" IS UNWARRANTED WHERE OK IDENTIFIES NO CIRCUIT SPLIT. NOR DOES OK'S DISGUISED SUFFICIENCY OF THE EVIDENCE ARGUMENT REGARDING ITS PRODUCTION LEVELS PRESENT A PROPER GROUND FOR REVIEW.

In Section III of the Petition, at pages 28-33, OK ostensibly presents a statutory construction argument regarding the phrase "with respect to live

poultry" in § 202(a) of the PSA. However, in almost the entirety of that section, as well as a significant portion of OK's Statement of the Case, OK addresses a different argument altogether: that there was insufficient evidence that OK's practices decreased production. Neither issue implicates a circuit split or any other basis for certiorari review.

### A. OK's construction of § 202(a) is without merit and has not been adopted by any court.

OK argues that § 202(a) should be construed to prohibit only unfair practices involving chickens that have already hatched, and that it was thus error for OK to be held liable for decisions to manipulate production if such decisions were taken prospectively. As summarized by the Tenth Circuit:

> OK argues that the PSA requires the Growers to prove that OK used an unfair practice with respect to actual, live birds that have already hatched. In particular, OK argues that under the statute, the Growers were required to show that OK produced certain actual, live chicks, and then either destroyed them or otherwise refused to allow the Growers to raise them.

*Been II*, App.16a. The Tenth Circuit rejected OK's interpretation of § 202(a) as "strained" and "without merit," holding:

> [P]rice manipulation in the form of arbitrarily reducing production may violate the PSA as an unfair practice. And a practice that reduces chick production by incubating fewer eggs, for example, is a practice "with respect to live poultry" as much as a practice that reduces chick production by destroying chicks that have already hatched. Both practices result in fewer live chickens being delivered to the Growers to raise and sell back to OK. Thus, either way, OK is reducing the price it pays its Growers for live poultry.

*Id.*, App.17a (citations omitted).

There is no circuit split on this issue. Indeed, OK does not cite a single opinion in the PSA's 90-year history that supports its position. Moreover, OK's interpretation is at odds with the purpose of § 202(a) and long-established principles of statutory construction. The PSA "is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen." *Swift & Co. v. U.S.*, 393 F.2d 247, 253 (7th Cir. 1968). Further, statutes are construed based on the plain and ordinary meaning of their words. *See Wultz v. Islamic Republic of Iran*, ___ F.Supp.2d ___, 2011 WL 263676, *5 (D.D.C. Jan. 28, 2011). Here, "with respect to" means "as regards" and "in relation to" and thus "merely indicates some relationship." *Hartford Cas. Co. v. Travelers Indem. Co.*, 110 Cal.App.4th 710, 719-20 (Cal.Ct.App. 2003); *see also Dillon Cos., Inc. v. Royal Indemnity Co.*, 369 F.Supp.2d 1277, 1287 (D. Kan. 2005). As correctly

decided by the Tenth Circuit, decisions that cause a decrease in the supply of live poultry involve live poultry no matter when they are made.

### B. OK's disguised sufficiency of the evidence argument was waived and is without merit.

Throughout the Statement of the Case and Section III of the Petition, OK repeatedly argues that it always produced at full capacity and thus never varied production. To be clear, this is a sufficiency of the evidence argument that was not preserved for appellate review.[2] *See* Order Denying Mot. For JMOL, App.82a. Further, such argument was rejected by both the District Court and the Tenth Circuit, which found that Growers demonstrated through specific and substantial evidence that, through the challenged practices, OK decreased production when it desired. *Id.*; *Been II*, App.18a. While OK may be unhappy that the jury chose to accept Growers'

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[2] Under Tenth Circuit law, failure to file a Fed. R. Civ. P. 50(a) motion bars appellate review of whether the evidence was sufficient to support the jury's finding. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000), *aff'd*, 532 U.S. 588 (2001). OK failed to address sufficiency of the evidence with respect to production levels in its Rule 50(a) motion.

evidence on this disputed fact issue, that is not a ground for certiorari review.

## CONCLUSION

This case was filed by a class of Oklahoma farmers in 2002. On its first appeal, the Tenth Circuit articulated the standards of proof governing claims under § 202(a) of the PSA, and held that a genuine issue of material fact existed as to whether OK had engaged in unfair practices in violation of that statute. After remand, the jury issued a verdict in favor of Growers. Both the District Court and the Tenth Circuit have held that the evidence was sufficient to support that verdict.

Now, nine years after this case was initiated, and three years after the jury's decision, OK asks this Court to reverse the judgment for Growers based on an issue that was the subject of a jury instruction that OK accepted, and that did not preclude OK from presenting the evidence of its allegedly minimal market share to the jury. The jury rejected OK's evidence. While OK is understandably unhappy at this result, it has failed to demonstrate that either the jury's verdict or the Tenth Circuit's opinion sustaining it could have any impact on the antitrust laws. Thus, there is no "circuit split" in need of resolution by this Court. For these reasons, and because OK can cite to no conflicting authorities regarding its

meritless "live chickens" argument, the Court should deny the Petition for Certiorari.

Respectfully submitted,

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